the result that only Rs. 300 net cash would be required. The remaining Rs. 4,500 under (d), together with this Rs. 300 make up Rs. 4,800 which I moved yesterday. But this transfer from 11 (e) Temporary establishment to 11 (c) Superintendent's Office has also to be formally moved in this House. For the proposal is to transfer from a votable head to a non-votable head, and as such it cannot be made except by formally moving an additional allotment. So the allotment of Rs. 4,980 has to be voted by the House instead of Rs. 4,800. It is more or less a mistake of the kind that happened some time before under Agriculture and Panchayats. I request that under these circumstances this Rs. 180 may be sanctioned.

Question put: *that the demand may be made.*

Motion carried.

Cochin Transfer of Property Bill.

President.—Now we shall take up the consideration of the Cochin Transfer of Property Bill.

Dr. A. G. Menon.—I have a petition to be presented to the Council from the people of Chittur. It is in conformity with the Standing Orders 60, 61 and 62. I do not think that I should reiterate the reasons, since the petition itself contains them. I have handed a signed copy of it to the Council Secretary. Of course it contains 81 signatures also. I would request the Hon'ble Secretary to read the petition in the Council.

President.—The petition may be read.

Secretary to the Council:—

"To

The Members of the Cochin
Legislative Council.

Sir,

The humble petition of the undermentioned bankers and other residents of the Chittur Taluk most respectfully showeth:—

1. That your petitioners have perused and understood the provisions of the proposed Cochin Transfer of Property Bill now on the Legislative anvil as amended by the Select Committe and beg leave to suggest the following in order that their suggestion might be considered and carried into effect before the Bill passes into law.

2. Section 59 sub-section (f) of the draft bill refers to deposit of title deeds and the said sub-section as now drafted, specifically allows such mortgages to be created in Mattancheri only.

3. Your petitioners beg to suggest that the Chittur Taluk area may also be specifically mentioned as a place where such transaction could be effected.

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4. The reasons for the suggestion are the following:—

(a) The said area is an agricultural centre and there are a number of bankers in the locality who are financing the cotton, ground-nut and paddy business of the place.

(b) The loans made to finance the said business are short-time, seasonal loans which are returned at the end of tha season for each of the business. The ground-nut season commences about Medam (May) and ends with Thulam (November). Monies advanced for ground-nut business in Medam and Edavam (May and June) are returned to the bankers by the end of Thulam (November). These amounts are then utilised for cotton and paddy business. Cotton business lasts between February and May and paddy business generally throughout the year. Large amounts are advanced for these purposes and it has been a long standing practice for the said banks to advance monies only on deposit of title deeds. Bankers would not be prepared to advance these amounts without such security and customers would on their part, not be prepared to accept loans at great cost and expenses incidental to the execution and registration of mortgage bonds for each season. In the result commerce would be considerably hampered and the business of the place crippled.

(c) Your petitioners submit that at Chittur there are a number of such bankers who finance the said trades. Paddy business is carried on a very extensive scale and Pollachi and Coimbatore markets are supplied with paddy by the Chittur Taluk, which is pre-eminently a big paddy centre, paying a large amount of revenue to Government as taxes on paddy land. If this business is not properly financed the whole trade in paddy and rice is likely tobe adversely affected and economic prosperity of ryots and land-holders considerably reduced.

(d) It does not appear that the aforesaid facts have been considered by the Select Committee.

(e) If statistics are taken it would be found that the practice of creating mortgages by deposit of title deeds is well-known and resorted to in the Chittur Taluk area more than in any other place in the State including the Mattancheri town.

5. Under the circumstances your petitioners pray that the said sub-section (f) of section 59 may be so amended as to include the Chittur Taluk area also as one where such mortgages can be effected before the Bill passes into law.

For which act of kindness your petitioners will, as duty bound, ever pray."

Mr. C. A. Kunjunni Raja.—The report of the Select Committee on the Cochin Transfer of Property Bill was presented last time to the Council. On account of the desire of some

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of the Members that since the Bill has not been sufficiently long before the public some time may be given for consideration, I did not move for the consideration of the Bill during the Kumbham Session. Now it has been sufficiently long before the public, I move that the Bill may be taken into consideration. There are, of course, a few amendments, most of which except one or two are only to correct errors in printing. The main controversial amendment is about the mortgage by deposit of title deeds for contending which to Chittur a petition is now presented. I shall say what I have to say upon that question when that amendment is taken into consideration.

Dr. A. G. Menon.—I beg to second it.

Mr. P. Krishna Menon.—Sir, under Standing order 37, clause 2, I move that the Bill be recommitted without limitation. Now in moving this, I know, I may be considered somewhat late, because though it is a motion for a recommital, the probable result of the recommital may be that the Bill will not be taken up for consideration at a subsequent stage. It may be said that with that sinister motive I am moving, but my only reply is that that is my motive but do not add the word sinister to that. If, as a matter of fact, I wanted this motion to be made I could have made it at an earlier stage by opposing the Bill as it then stood. But why I did not do it at that time is due to the simple fact that at certain stages it was said that some sort of convention has been introduced into the Council and that it was not proper to raise objections at those particular stages. Whether that was a valid reason or not, I have only to confess that I fell a victim to the suggestion and I did not move. As a matter of fact, and to be frank, I do not think that this piece of legislation is a matter of necessity now. I know that some arguments will be raised by those who support the introduction and the passing of this Bill. But I shall not anticipate them at this stage and I shall now, for the present, content myself by stating the reasons why I do not propose to have this Bill passed into law. In the first place, the Transfer of Property Bill if passed into law will not be a substantive law creating or conferring rights upon the people. It is practically prescribing procedure and nothing more. Therefore by the passing of this Regulation no new right will be conferred upon the subjects. That is my first point.

Secondly, by the introduction and the passing of this Regulation, a lot of technicalities in procedure will be introduced to which we have not been accustomed for the last so many years —more than half a century, I would say. As most of these Hon'ble Members are lawyer Members in one form or another I don't think it necessary to give details.

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The other point that I wish to emphasise is there has been a long-standing practice with regard to suits relating to the transfer of immovable property and that practice has been so much instilled into the minds of the litigant public that any digression from it will seriously affect them. In other words or to put it briefly a long-standing practice will be violently disturbed if the law is introduced.

Another point that I wish to emphasise is that, if the Regulation is passed into law, it increases the cost of litigation. In that case also I do not think it necessary to enlighten the House by quoting examples, because most of the lawyer Members know what I mean.

Dr. A. G. Menon.—You may do it for the benefit of the non-lawyer Members.

Mr. P. Krishna Menon.—Just one instance that comes to my mind. In the case of mortgages and leases back, it has been the invariable practice of this State to institute a suit upon the lease back and to sell the equity of redemption after getting a decree on the lease, for surrender and for arrears of rent, reserving the mortgage debt. If the law is introduced, it will be found that you will have to sue upon the mortgage itself. Therefore there is an increase in the costs and the court fee. That I believe is an example which will show that it increases the cost of litigation.

The other point that I wish to emphasise is, what is the corresponding compensation or even any compensation that we derive by passing this Regulation into law. What is it that we are going to get now by passing this Regulation into law? Are not all the procedures contemplated by this Regulation, now in practice and in vogue, and given effect to by all the courts? Therefore, in the absence of any specific benefit whatever, I think the passing of such a Regulation is unnecessary. Now to anticipate one or two objections that may be raised or arguments that might be advanced in favour of the passing of this Regulation, I can concede that codification is a necessity under certain circumstances. I have heard from one of my lawyer friends that codification is necessary to check the vagaries of Judges. I was very sorry indeed to hear that statement from a lawyer friend because if Judges are inclined to practice vagaries certainly any amount of law, any number of sections, will not check them. Therefore, to assign that as a reason, is saying that there is no reason whatsoever for them to be advanced.

Another reason that they say is, it would conduce to the uniformity of decisions and practices. Well, even there, I beg to differ because in several High Courts it would be found that

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the same section has been differently interpreted and decisions given. Therefore, the question of uniformity of decision does not depend upon the existence of a section but it depends upon the interpretation that is put upon it. Therefore these two arguments that I anticipate from those who support the passing of the Regulation, I wish to answer by saying that in the first place the check that th y intend to put upon the Judges, I mean Courts, will not be effected by the passing of this Regulation, nor can uniformity be attained. One point I wish to emphasise here, because I ask Hon'ble Members who had been Judges. or Munsiffs, from the highest to the lowest stage, have they ever felt the absence of a Regulation as being a handicap for the administration of justice, when they were sitting as Judges? I appeal to them, I appeal to their experience and to support my motion on the ground that unnecessary shackles, prescribing technicalities a slipping of which would be attended with very serious and injurious results, are uncalled for. With these words I beg to move that it may be recommitted.

Mr. A. S. Harihara Ayyar.—Sir, while seconding the present motion I only bring to the notice of this House that this piece of legislation is quite uncalled for and not in fact giving effect to the existing laws of transfer in the country. The only salient view of the present bill is that it refers to the deposit of the amounts of mortgages in Courts. That procedure alone is not in our State. These three clauses may be embodied in the Civil Procedure Code itself and the effect of this Bill may be given effect to in the State. The rest of the clauses contained in the Bill are unnecessary for the present security of the State.

Mr. C. A. Kunjunni Raja.—I wish to say a few words in answer to the motion for adjournment. It is too late to raise this objection that the bill may be recommitted. If the idea is that this Council shall not consider this subject, this is a very clever motion, because this is the last meeting of this Council and there is no meaning in recommitting this bill to the Select Committee because that Committee cannot go into this question again. The objection with regard to the acceptance of the principles of the bill should have been raised when the bill was introduced in the Council and before a reference to the Select Committee was made. The very fact that the Council was for a reference to the Select Committee, shows that the principles of the bill have been accepted; otherwise there was no use of wasting all this money by going into a committee. Now this Select Committee has considered all necessary amendments and re-drafted the bill. The bill in its original form was published in the Gazette; public criticisms were invited and

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whatever criticisms the Committee had were considered. There was not much objection except with regard to mortgage by deposit of title deeds. The re-drafted bill was published in the Gazette. We had not much criticisms received in the Committee or afterwards against this measure and that shows the whole country is in favour of this legislation. Under such circumstances it is too late to come and say that the bill may be recommitted.

Then with regard to the benefits that are said not to result from this piece of legislation, it shows that the mover has not himself read all the provisions in the bill, although the seconder seems to have read and by his amendments suggests that some provisions of the bill may be retained. Even on the question of the expenses of litigation I refer you, Sir, to clauses 88 and 89 of the bill with regard to the deposit of mortgage money in Courts. For suits on mortgages what is done now is full court-fee has to be paid on the whole mortgage amount; if this bill becomes law, by a petition to the Court the whole amount could be deposited; for which court-fee on the whole amount will be saved, and mortgage transactions will be closed without the worry and expenses of an original suit. It is a very easy procedure. It is a departure from the existing state of things and people are sure to welcome it because that will decrease the cost of litigation by saving court-fees and Vakils' fees to a large extent.

Then with regard to the last objection, there was a time in Cochin when Judges were left to decide cases according to justice. There were neither laws of procedure nor substantive laws; much less of statutory laws. Does the mover want to revive those days? Time has changed and the legislature has to interfere, and the discretion of the judiciary has to be curtailed, and laws which are only the directions given by the Legislature have to be administered and that is the place of statutory legislation in every advanced State. Of course our Cochin Courts do apply, as a Court of Equity, some of the principles underlying the provisions of the Transfer of Property Act. But that leaves a wide discretion to the Courts. When it does not suit them they will say we are not bound by the Transfer of Property Act, since there is no such statutory enactment in the State. When it suits their purpose, they will say we will apply the provisions of the Transfer of Property Act. There are many cases to illustrate this attitude. Many have incurred much loss on account of the want of definite provisions on this subject. For instance, whether an attaching creditor could sue for redemption was not definite, for there was no statutory law on the subject and in suits for sale an attaching creditor was never used to be made a party. The Chief Court in one of the decisions allowed

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that right knowing that there was no such law; there was a previous sale of the very same property in which the attaching creditor was not impleaded and the whole sale was set aside after a long period and much loss had to be incurred by the purchaser. There are several cases like that and it is necessary to know what the law is on the subject and it is for that, that this piece of legislation is introduced. For these reasons I submit that this motion for adjournment should not be carried in this Council.

Mr. A. B. Salem.—I also rise to oppose this amendment. There is no meaning in asking this House, which had already accepted the principles of the legislation, and which has gone forward to the Select Committee and got its report, and when it comes for the final stage here, to ask that the bill be recommitted. I think the Hon'ble Member was present here throughout, and for him to have brought forward this motion at this stage does not come with any grace at all to the position of this House. Apart from that, let me examine the arguments that the Hon'ble Member brought forward. He said, for fifty years and odd we have been going on without these technicalities. At the same time he said that although the provisions of the Regulation were not statutory they have been adopted by the Judges. Well, if so what is the wrong in codifying it? They have been already accepted and they have been brought into force by Judges freely. Let us have it well coded; it is only to avoid any mis-interpretation or any other interpretation which are at variance between the Judges. There are cases. A case has already been quoted by the Hon'ble mover of this bill to show how difficulties arose for want of codification, and certainly every amendment that my learned friend wants to bring forward can always be brought as an amending bill. He can bring forward an amending bill whenever difficulties come forward and there is no point in saying that the bill may be re-committed.

As regards the question of the costliness of litigation that would ensue by the passing of this Regulation, the Hon'ble mover has already answered, that it will simplify the cost by allowing people to deposit mortgage money. Here we have the custom of suing upon the lease. Whether this piece of legislation would take away any right which we already have is the question. If you have that right you may still adopt that method of suing upon leases unless it is prohibited. If it is prohibited we have very good reasons for doing it. To say that we must have a law not codified but which has already been accepted here, is too much. And then whether the Judges have felt handicapped or whether they have felt free we want to know the law first and so

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there is a great necessity for this particular Transfer of Property law in the State. I think the Hon'ble Members will know that we have a large number of uneducated Kariasthas, going about drawing up documents and bringing about a lot of difficulty in the way of clients. If a little technicality is introduced, this sort of documents will cease in the land and it is a good thing too. Therefore, from all aspects we are inclined not to accept the proposition for re-committal and I think it will be sheer waste of time and it will be condemning ourselves. We have gone through a lot of labour ; never mind the expenses, it was not large; a lot of time and energy have been spent and what for ? Just to codify the law. What is going to happen ? If there is a change necessary in the opinion of the Hon'ble Member or in the opinion of any other Member in the working of the legislation, they can at any time bring an amendment. I submit there is no case brought out for the re-commital of this Bill.

Mr.T.S.Narayana Ayyar.—I also rise to oppose the amendment of Mr. Krishna Menon. The absence of a piece of legislation as the Transfer of Property Act was felt long, long ago and the Administration Reports of previous years show that everybody was feeling the absence of that law in Cochin. The Darbar had also been so feeling. There were also representations in previous years that the law of transfers in Cochin should be made clear and the provisions of the Transfer of Property Act of British India should be made applicable here. These were the various reasons which induced the Government to support a bill of this nature, and sufficient notice was given to the House from the earliest times. When leave to move was really made, and even at the time when the bill was sought to be introduced, there was absolutely no sort of whisper anywhere. We are not going to introduce any new law here. It is true that we are bodily applying every principle underlying the Act in British India to cases arising in Cochin. But when they are too technical or unnecessary to be introduced here, of course, our Judges say we need not go to this length. Apart from that, every other principle, every other section in the Act, which may be applied here with safety, are applied. Only that we have not got the law. The difficulty on that account is this. We do not know, as a matter of fact, what principle will be followed by certain Judges and what principle will not be followed. As the mover of the amendment himself remarked there are differences of opinion among the Judges with regard to the sections, one High Court holding in a certain way others in another way. We must

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have a definite guide. In the Act of 1930 almost all the conflicting rulings and conflicting principles given by the High Courts were codified by eminent men who sat at it in 1921 and worked out the whole thing for about ten years and the bill of 1929 is the outcome of that. I have gone through the provisions of the bill carefully and I may submit to the House that almost every point of difference has been set at rest in the recent Act of 1930. There have been nearly 40 or 50 amendments to the Act of 1882 and they have solved all the difficulties in the Act of 1930. Instead of waiting to discuss the whole thing section by section or provision by provision we thought it advisable to introduce the Act of 1930 bodily and, with regard to the recent amendments that are sought to be made, it is for the House to see whether those amendments are good or not in every respect.

The Bill we are now introducing cannot be said to be very new. I really agree with my learned friend in thinking that for the first time. We are introducing codified law. There are technicalities too. All these things are true. But all these things naturally arise in a case of this nature. On that ground alone we cannot say that we do not want to codify the law. There must be something definite before the public and there must be something definite before the Judges and before the Courts, and unless that something is clear before the public, they do not know, and they cannot know, what is law and what is not law; and therefore, in the interests of the State as a whole, I oppose the amendment moved by Mr. Krishna Menon.

Mr. K. P. Kannan Nayar.—Sir, I also oppose this motion for re-committal. It seems a strange procedure is being adopted. A bill, generally when it comes, when it is sponsored by a non-official Member, takes three stages. First, he asks for leave to introduce and then the bill is published. He then introduces the bill for consideration. Under section 31, Sir, you will see that at any time after a bill has been published in the Gazette, the Member in charge of the bill may introduce it. When introducing a bill the Member will move that it may be read in Council. If the motion be seconded, the principle of the bill and its general provisions may then be discussed, and if the motion be carried the Secretary shall read the title of the bill. So there was a time when, if this bill or its general provisions were found unacceptable, and if this mover thought that this bill was an unnecessary piece of measure to be introduced in this Council, there was a time when this motion should have been made. The principle of the bill was discussed, its general provisions were also discussed and the House allowed the motion to go. That shows the House itself was willing to have

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this bill on its Statute Book. It was only after that the Select Committee was appointed to consider the various provisions and consider whether any codification was necessary and whether any of its provisions should be modified or absolutely deleted. Last time when this bill came up, the Hon'ble Member in charge of the bill said that there was a general opinion expressed in the House that the consideration of the bill may be postponed, because many of the Members had not come prepared. I think it was on that distinct understanding that the Member in charge of the bill did not present the Select Committee Report then. Now at the fag end of this House to have recourse to this dilatory tactics, as I will put it, when the bill has actually been reported by the Select Committee, and when the person who brought it wants the bill to be considered, there is no other provision but to consider the amendments if amendments are tabled, or read the bill clause by clause and put them to the vote of the House.

Mr. P. Krishna Menon.—Please refer to Standing Order No. 37.

Mr. K. P. Kannan Nayar.—According to my humble opinion the Hon'ble Member is having recourse to the Standing Order No. 37 and is trying to put some construction upon it which is not warranted by the section. Standing Order No. 37 says, "After the presentation of the final report of the Select Committee on a Bill the member in charge may move (1) that the bill as reported by the Select Committee be taken into consideration; but any Member may object to it being so taken into consideration if a copy of the report has not been available for the use of Members for 7 days, or if three months have not elapsed from the date of the first publication of the Bill; and such objection shall prevail unless the President, in the exercise of his power to suspend this rule allows the report to be taken into consideration or that the Bill be re-committed"—that is again a power vested in the mover of the bill :— 'either a) without limitation, or (b) with respect to particular clauses or amendments only, or (c) with instructions to the Select Committee to make some particular or additional provision in the Bill." The next clause which gives the power of re-committal to the other Members as well should be modified by the previous clauses. Re-committal is not for purposes of saying that we do not want a bill. For you to say that a bill is not absolutely necessary and the bill should not be introduced, there was a time and that time has passed. The power to re-commit is for a different purpose altogether. That is why I submit that the Member is wrong in referring to this particular Standing Order. Some sinister motive is apprehended when he is having recourse to Standing Order No. 37. My submission is that it is absolutely out of place. As regards the desirability I would like to have the existing law, if there is any law, and the general principles to be codified as much as

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possible for people to understand it. Why was the Indian Contract Act introduced here, as it is? There are so many sections there. It is not giving substantive right. It existed here previously also. Why did we bodily introduce some other Acts as they were passed in British India? Here, with reference to the Transfer of Property Act, those principles are tried to be codified as exhaustively as possible and codification is a matter which is desired by Judges, the litigant public and the vakils who are actually looking after the law and what the practice will be or what the rights are under such laws. If there is any particular clause that is objectionable that particular clause may be actually deleted, or it may be modified, if there are amendments; so that my submission is that this re-committal motion should certainly not be heeded to by this Council.

Mr. P. Krishna Menon.—Sir, I am glad that the opposition has more than justified my attempt because no substantial answer has been given to the reasons that I have stated for my motion. But I have been met by more than one Member by saying that I am late, and that I had an opportunity of doing this at an earlier stage and therefore I should not be heard. That is more or less the purport of the opposition. There I say it is technicality to the highest degree that they rely upon to throw out my motion. It is exactly this point that I want to emphasise. Because the introduction of the law as it is, apart from the merits of codification, is to introduce technicality, as one Member said. That, I think, the whole House consented to at the introduction of the bill. True, as to the principles of the bill there has been no opposition because the principles are carried into effect. But it is only with regard to the procedure that objection is taken and on my part that is the very reason why I said that these technicalities should not interfere with the work of our Courts. No doubt the absence of specific provisions which has entailed some injury and damage to certain parties is one of the reasons suggested by the Hon'ble mover of the bill, as if there are not cases of parties suffering injury and damage even in cases where specific provisions are in existence. Certainly therefore that is not the criterion that we should take into consideration. It is the general effect. The general effect as I have attempted to point out is the introduction of the technicalities which will create confusion and increase litigation. On this point I again appeal to the House that the House will, after mature consideration, vote upon my motion.

The motion was put to the vote of the House and negatived.

Question put: *that the bill may be taken into consideration.*

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Motion carried.

President.—We will then take up the consideration of the amendments.

Mr. V. K. Kochunny Menon.—I do not think it is advisable to take up the amendments first. We may not vote for some sections as they are. For that matter we have to go clause by clause.

President.—Then I shall read the bill clause by clause.

Preamble:—Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties, it is hereby enacted as follows:—

The preamble was put and agreed to.

President.—There is an amendment to the 1st section.

Mr. T. S. Narayana Ayyar.—In section 1, that portion which deals with the commencement of the Regulation, namely, "it shall come into force at once", I move it may be substituted by, 'it shall come into force on such day as the Government may, by notification in the Cochin Government Gazette, direct'. The reasons I have to give in favour of this amendment are these:—The Regulation as I have already observed is no doubt a highly technical one and contains many important provisions or processual law. Considerable changes in the matter and mode of conveyancing are also sought to be introduced by the Regulation. It is therefore essential that sufficient time be allowed to the public to get themselves acquainted with the new law before it takes effect. The Regulation has to be translated into Malayalam which I think is no matter of small importance and it has to be translated very accurately, that is to say a task which I do not in any way consider to be light. It has also to be widely circulated and as this piece of legislation is also new to the State it is advisable that it should be brought into force only after sufficient lapse of time. Hence this motion.

Mr. T. K. Krishna Menon.—I second it.

The amendment was put and agreed to.

Question put:—*That the section as amended, stand part of the bill.*

Short title, Commencement and Extent.—"This Regulation may be called the Cochin Transfer of Property Regulation of 110 .

It shall come into force on such day as the Government may, by notification in the Cochin Government Gazette, direct.

It shall extend to the whole of Cochin.

Motion carried.

President.—Section 2 reads thus:—

Saving of certain enactments, incidents, rights, liabilities etc.

Nothing contained in this Regulation shall be deemed to affect:—

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(a) The provisions of any enactment not hereby expressly repealed;

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Regulation and are allowed by the law for the time being in force;

(c) any right or liability arising out of a legal relation constituted before this Regulation comes into force, or any relief in respect of any such right or liability; or

(d) save as provided by Section 58 and chapter IV of this Regulation, any transfer by operation of law, or by, or in execution of a decree or order of a Court of competent jurisdiction;

And nothing in the II Chapter of this Regulation shall be deemed to affect any rule of Muhammadan law.

Mr. A. S. Harihara Ayyar.—In the last para it is stated that 'nothing in the 2nd chapter of this Regulation shall be deemed to affect any rule of Muhammadan law.' In the British Indian Transfer of Property Act there is also the word 'Hindu'. So the word 'Hindu' may also be added.

President.—Since you have tabled no amendment you will have to object to the whole section, standing part of the bill.

Mr. A. S. Harihara Ayyar.—The last portion may be put to votes.

President.—The whole section must go together. You may oppose the section as a whole.

Section 2 was then put and agreed to.

President.—There is an amendment to section 3.

Mr. C. A. Kunjunni Raja.—In section 3 in the definition of "Notice" change "of" into "or" between "share" and "interest."

Mr. A. B. Salem.—I second it.

The amendment was put and agreed to.

Question put—*That section 3 as amended, stand part of the bill.*

In this Regulation, unless there is something repugnant in the subject or context:

Interpretation clause.

Immovable Property. "immoveable property" does not include standing timber, growing crops or grass;

Instrument. "instrument" means a non-testamentary instrument;

Attested. "attested," in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark or of the signature

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of such other person, and each of whom has signed the instrument in the presence of the executant. But it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary;

Registered. "registered" means registered in Cochin under the law for the time being in force regulating the registration of documents;

Attached to the earth. "attached to the earth" means—

(a) rooted in the earth as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

Actionable claim. "actionable claim" means a claim to any debt, other than a debt secured by the mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief whether such debt or beneficial interest be existent, accruing, conditional or contingent;

Notice. and a person is said to have "notice" of a fact when he actually knows that fact or when, but for wilful abstention from an enquiry or search which he ought to have made or gross negligence he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not at all situated in one district or where the registered instrument has been registered under the Cochin Registration Regulation V of 1084 from the earliest date on which any copy of such registered instrument has been filed by any District Registrar within whose district any part of the property which is being acquired, or of the property where in a share or interest is being acquired, is situated.

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Cochin Registration Regulation V of 1084, and the rules made thereunder,

(2) the instrument has been duly entered or filed, as the case may be, in books kept under section 44 of that Regulation, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 48 of that Regulation.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material.

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Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognisant of the fraud.

Motion carried.

President.—Then section 4.

Enactments relating to contracts to be taken as part of Contract Act.

4. The chapters and sections of this Regulation which relate to contracts shall be taken as part of the Indian Contract Act, 1872, as made applicable to Cochin by the Proclamation of His Highness the Raja of Cochin.

And sections 55, paragraphs 2 and 3, 60, 104 and 121 shall be read as supplemental to the Cochin Registration Regulation V of 1084.

The section was put and agreed to.

President.—Then section 5.

"Transfer of property" defined.

5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself or to himself and one or more other living persons; and "to transfer property" is to perform such act.

In this section 'living person' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

The section was put and agreed to.

President.—Then section 6. Government Advocate will move his amendment.

Mr. T. S. Narayana Ayyar.—"In section 6, clause (1) after '1872' and before 'or' add the following words:—'As made applicable to Cochin by His Highness the Raja's Proclamation dated 14th August 1908.'" I here refer to our enactment and not to the British enactment and therefore the change is introduced.

Mr. T. K. Krishna Menon.—I second it.

The Amendment was put and agreed to.

Question put:—*The section as amended, stand part of the bill.*

What may be transferred.

"Property of any kind may be transferred except as otherwise provided by this Regulation, or by any other law for the time being in force.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except to the owner of the property affected thereby.

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(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

(f) A mere right to sue cannot be transferred.

(g) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(h) Stipends allowed to military, air force and civil pensioners of Government and political pension cannot be tranferred.

(i) No transfer can be made (1) in so far as it is oppcsed to the nature of the interest affected thereby or (2) for an unlawful object or consideration with in the meaning of section 23 of the Indian Contract Act, 1872, as made applicable to Cochin by His Highness the Raja's Proclamation dated 14th August 1908 or (3) to a person legally disqualified to be transferee.

(j) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of the Court of Wards, to assign his interest as such tenant, farmer or leassee.

Motion carried.

President.—Then sections 7 to 30.

Persons competent to transfer.

7. Every person competent to contract, and entitled to transferable property, or authorised to dispose of tran ferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent, and in the manner allowed and prescribed by any law for the time being in force.

The section was put and agreed to.

Operation of transfer.

8. Unless a different intention is expressed or necessarily implied, a a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and where the property is machinery attached to the earth, the movable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect

The section was put and agreed to.

Oral transfer.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

The section was put and agreed to.

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10. Where property is transferred subject to a condition or limitation, absolutely restraining the transferee or any person claiming under him from parting with, or disposing of his interest in the property, the condition or limitation is void except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu or Muhammadan), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Condition restraining alienation.

The section was put and agreed to.

11. Where on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Restriction repugnant to interest created.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

The section was put and agreed to.

12. When property is transferred subject to a condition or limitation, making any interest therein reserved or given to or for the benefit of any person to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

The section was put and agreed to.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person, not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit unborn person.

Illustration.

A transfers property, of which he is the owner, to *B*, in trust for *A* and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect because it does not extend to the whole of *A*'s remaining interest in the property.

The section was put and greed to.

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14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

The section was put and agreed to.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class.

Transfer to a class, some of whom come under sections 13 and 14.

The section was put and agreed to.

16. Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction, and intended to take effect after or upon failure of such prior interest, also fails.

Transfer to take effect on failure of prior interest.

The section was put and agreed to.

17. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

Direction for accumulation.

(a) the life of the transferor, or

(b) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(iii) the preservation or maintenance of the property transferred;

and such direction may be made accordingly.

The section was put and agreed to.

18. The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health; safety or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

The section was put and agreed to.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith, or on the happening of an event which must happen, such interest is vested, unless a contrary intention

Vested interest.

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appears from the terms of the transfer. A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation:—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives or from a provision that, if a particular event shall happen, the interest shall pass to another person.

The section was put and agreed to.

When unborn person acquires vested interest on transfer for his benefit.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest although he may not be entitled to the enjoyment thereof immediately on his birth.

The section was put and agreed to.

Contingent interest.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest in the former case on the happening of the event; in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of a property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him obsolutely the income to arise from such interest before he reaches that age, or directs the income, or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

The section was put and agreed to.

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

The section was put and agreed to.

Transfer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

The section was put and agreed to.

Transfer to such of certain persons as survive at some period not specified.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

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Illustration.

A transfers property to *B* for life, and after his death to *C* and *D* equally to be divided between them, or to the survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B*'s death the property passes to *D*.

The section was put and agreed to.

Conditional transfers.

25. An interest created on a transfer of property and dependent upon a condition, fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy.

Illustrations.

(a) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) *A* gives Rs. 500 to *B* on condition that he shall marry *A*'s daughter *C*. At the date of the transfer, *C* was dead. The transfer is void.

(c) *A* transfers Rs 500 to *B* on condition that he shall murder *C*. The transfer is void.

(d) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

The section was put and agreed to.

Fulfilment of condition precedent.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(a) *A* transfers Rs. 5,000 to *B* on condition that be shall marry with the consent of *C*, *D* and *E*. *E* dies. *B* marries with the consent of *C* and *D*. *B* is deemed to have fulfilled the condition.

(b) *A* transfers Rs. 5,000 to *B* on condition that be shall marry with the consent of *C*, *D* and *E*. *B* marries without the consent of *C*, *D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

The section was put and agreed to.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and, by the same transaction, an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A*'s death, and if he should neglect to do so, to *C*. *B* dies in *A*'s life-time. The disposition in favour of *C* takes effect.

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(b) *A* transfers property to his wife; but, in case she should die in his life-time, transfers to *B* that which he had transferred to her. *A* and his wife perish together under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

The section was put and agreed to.

Ulterior transfer conditional on happening or not happening of specified event.

28. On a transfer of property, an interest therein may be created to accrue to any person with the condition superadded that, in case a specified uncertain event shall happen, such interest shall pass to anothor person or that, in case a specified uncertain event shall not happen, such interest shall pass to another person. In each csae the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

The section was put and agreed to.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to *B* to be paid to him on his attaining his majority, or marrying with a proviso that, if *B* dies a minor, or marries without *C*'s consent, the said Rs. 500 shall go to *D*. *B* marries, when only 17 years of age, without *C*'s consent. The transfer to *D* takes effect.

The section was put and agreed to.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustratian.

A transfers a farm to *B* for her life, and, if she does not desert her husband, to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

The section was put and agreed to.

President.—Section 31.

Mr. T. S. Narayana Ayyar.—In section 31, clause (b) substitute the word "prescribed" for "specified".

Mr. T. K. Krishna Menon.—I second it.

The amendment was put and agreed to.

Question put: *that section 31 as amended, stand part of the Bill.*

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

"Subject to the provisions of section 12, on a transfer of property, an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case the specified uncertain event shall not happen.

Illustrations.

(a) *A* transfers a farm to *B* for his life with a proviso that in case *B* cuts down a certain wood the transfer shall cease to have any effect.

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B cuts down the wood. He loses his life interest in the farm,

(b) *A* transfers a farm to *B* provided that if *B* shall not go to England within 3 years after ths date of transfer his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

Motion carried.

President.—Sections 32, 33 and 34.

Such condition must not be invalid.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Section put and agreed to.

Transfer conditional on performance of act, no time being specified for performance.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act,

Section put and agreed to.

Transfer conditional on performance of act time being specified.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall, as against him, be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is, by the fraud of a person interested in the non-fulfilment of the condition, rendered impossible or indefinitely postponed, the condition shall as against him, be deemed to have been fulfilled.

Section put and agreed to.

President.—Section 35, Mr. Kunjunni Raja.

Mr. C. A. Kunjunni Raja.—In section 35 clause (6) change "had" into "has" between "conferred" and "enjoyed".

Mr. A. B. Salem.—I second it.

Amendment put and agreed to.

Question put: *that section 35 as amended stand part of the Bill.*

Election when necessary.

35. (1) Where a person professes to transfer property which he has no right to transfer, and, as part of the same transaction, confers any benefit on the owner of the property, such owner must elect either to confirm such transfer, or to dissent from it, and, in the latter case, he shall

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relinquish the benefit so conferred, and the benefit so relinquished, shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of *C*, and worth Rs. 800. *A*, by an instrument of gift, professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must, out of the Rs. 1,000, pay Rs. 800 to *B*.

(2) The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

(3) A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

(4) A person, who, in his one capacity, takes a benefit under the transaction, may, in another, dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

(5) Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election or if he waives enquiry into the circumstances.

(6) Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

(7) Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to *B* an estate to which *C* is entitled, and as part of the same transaction, gives *C* a coal-mine. *C* takes possession of the coal-mine and exhausts it. He has thereby confirmed the transfer of the estate to *B*.

(8) If he does not, within one year after the date of the transfer, signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

(9) In case of disability, the election shall be postponed until the disability ceases or until the election is made by some competent authority.

Motion carried.

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President.—Section 36 to 48.

Apportionment of periodical payments on determination of interest of person entitled.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends, and other periodical payments in the nature of income, shall upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Section put and agreed to.

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed, and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Government, by notification in the Cochin Government Gazette, so directs.

Illustrations.

(a) *A* sells to *B*, *C* and *D*, a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep. *B* having provided half the purchase money, and *C* and *D* one quarter each, E having notice of this must pay Rs. 15 to *B*, Rs. 7½ to *C* and Rs. 7½ to *D*, and must deliver the sheep, according to the joint direction of *B*, *C* and *D*.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for *A*, *B*, *C* and *D* severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all according to such directions as *B*, *C* and *D* may join in giving.

Section put and agreed to,

Transfer by person authorised only under certain circumstances to transfer.

38. Where any person, authorised only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

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Illustration

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property, held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance and that the sale of the field is necessary; and acting in good faith, buys the field from *A*. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Section put and agreed to.

Transfer where third person is entitled to maintenance.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred the right may be enforced, against the transferee if he has notice thereof, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Section put and agreed to.

Burden of obligation imposing restriction on use of land.

40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or

Or of obligation annexed to ownership but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

Such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to *B*. While the contract is still in force, he sells Sultanpur to *C*, who has notice of the contract. B may enforce the contract against *C* to the same extent as against *A*.

Section put and agreed to.

Transfer by ostensible owner.

41. Where, with the consent, express or implied, of the person interested in immovable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

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Section put and agreed to.

42. Where a person transfers any immovable property reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration.

A lets a house to *B*, and reserves power to revoke the lease, if, in the opinion of a specified surveyor, *B* should make use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B*'s lease subject to the opinion of the surveyor as to *B*'s use of the house having been detrimental to its value.

Section put and agreed to.

43. Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Transfer by unauthorised person who subsequently acquires interest in property tranferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father *B*, sells to *C* three fields, x, y and z representing that *A* is authorised to transfer the same. Of these fields, z does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying, *A*, as heir, obtains z. *C*, not having rescinded the contract of sale, may require *A* to deliver z to him.

Section put and agreed to.

44. Where one of two or more co-owners of immovable property, legally competent in that behalf, transfers his share of such property or any interest therein the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part-enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Transfer by one co-owner.

Where the transferee of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part-enjoyment of the house.

Section put and agreed to.

45. Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund, and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract

Joint transfer for consideration.

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to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Section put and agreed to.

Transfer for consideration by persons having distinct interests,

46. Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(a) *A*, owning a moiety, and *B* and *C* each a quarter share of mouza Sultanpur exchange an eighth share of that mouza for a quarter share of mouza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* each to a sixteenth share in that mouza.

(b) *A*, being entitled to a life interest in mouza Atrali, and *B* and *C*, to the reversion, sell the mouza for Rs. 1,000. *A*'s life interest is ascertained to be worth Rs. 600; the reversion, Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase money; *B* and *C* to receive Rs. 400.

Section put and agreed to.

Transfer by co-owner of share in common property.

47. Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in mouza Sultanpur, transfer a two-anna share in the mouza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer, one-anna share is taken from the share of *A*, and half-anna share from each of the shares of *B* and *C*.

Section put and agreed to.

Priority of rights created by transfer.

48. Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Section put and agreed to.

President.—Amendment to section 49 by the Government Advocate.

Mr. T. S. Narayana Ayyar.—In section 49, line 2, omit the word 'the' between 'of' and 'transfer'.

Mr. T. K. Krishna Menon.—I second it.

Amendment put and agreed to.

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Question put: *that section 49 as amended, stand part of the Bill.*

"Where immovable property is transferred for consideration, and such property or any part thereof is, at the date of transfer, insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in re-instating the property".

Motion carried.

President.—Sections 50 to 55.

Rent *bona fide* paid to holder under defective title.

50. No person shall be chargeable with any rents or profits of any immovable property which he has, in good faith, paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to *B* at a rent of Rs. 50, and then transfers the field to *C*. *B*, having no notice of the transfer, in good faith pays the rent to *A*. *B* is not chargeable with the rent so paid.

Section put and agreed to.

Improvements made by *bona fide* holders under defective title.

51. When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

Section put and agreed to.

Transfer of property pending suit relating thereto.

52. During the pendency in any court having authority in Cochin of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court, and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of

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the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

Section put and agreed to.

Fraudulent transfer.

53. (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

Section put and agreed to.

Part performance.

54. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract;

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

Section put and agreed to.

'Sale' defined.

55. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

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Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Sale how made.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

Contract for sale.

It does not, of itself, create any interest in, or charge on, such property.

Section put and agreed to.

President.—Section 56. Mr. Kunjunni Raja.

Mr. C. A. Kunjunni Raja.—In section 56 clause (1) (a) transpose 'title' to before 'thereto' instead of after it.

Mr. A. B. Salem.—I second it.

The amendment put and agreed to.

Mr. C. A. Kunjunni Raja.—Another amendment in Section 56. In Section 56 clause (5) (a) insert 'that' between 'believe' and 'the seller'.

Mr. A. Eachara Menon.—I second it.

The amendment put and agreed to.

Question put: *that Section 56 as amended, stand part of the Bill.*

56. In the absence of a contract to the contrary, the buper and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next followiug, or such of them as are applicable to the property sold:—

Rights and liabilities of buyer and seller.

(1) The seller is bound—

(a) to disclose to buyer any material defect in the property or in the seller's title therto of which the seller is, and the buyer is not, aware, and which the buyer could uot with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) on paymet or tender of the amount due in respect of the price, to execute a proper conveyance of the propeity when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of fhe contract of sale and the delivery of the property, to take as much care of the property aud all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(f) to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits;

(g) to pay all the public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to

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incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered, or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time vested.

(3) Where the whole of the purchase money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But, in case (a) the seller, and in case (b), the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents, and furnish such true copies thereof or extracts therefrom as he may require; and, in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment for the amount of the purchase money or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs, provided that, where the property is sold free from incumbrances, the buyer may retain, out of the purchase-money, the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury, or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

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(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property as against the seller and all persons claiming under him to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery, and for interest on such amount, and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract, or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph 1, clause (a), and paragraph 5, clause (a) is fraudulent.

Motion carried.

President.—Section 57.

Marshalling by subsequent purchaser.

57. If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

Section put and agreed to.

President.—Section 58, Government Advocate.

Mr. T. S. Narayana Ayyar.—In section 58 sub-clause (1) of clause (a), line 3, add the words 'or Cochin' between the words 'India' and 'the'.

Mr. T. K. Krishna Menon.—I second it.

Amendment put and agreed to.

Question put: *that section 58, as amended, stand part of the bill.*

Provision by court for incumbrances and sale freed therefrom.

58. (a) Where immovable property subject to any incumbrance, whether immediately payable or not, is sold by the court, or in execution of a decree, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court,—

(1) in the case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India or Cochin, the court considers will be sufficient by means of the interest thereof, to keep down, or otherwise provide for—that charge, and

(2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But, in either case, there shall also be be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses, and interest and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original

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amount to be paid in, unless the court, for special reasons (which it shall record), thinks fit to require a larger additional amount.

(b) Thereupon the court may, if it thinks fit, and after notice to the incumbrancer, unless the court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(c) After notice served on the person interested in, or entitled to, the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order, or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate ; (2) any other court which the Government may, from time to time, by notification in the Cochin Government Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

Motion carried.

President.—Section 59, Mr. Harihara Ayyar.

Mr. A. S. Harihara Ayyar.—This happens to be an important amendment, I think we will continue it after lunch.

The House rose for lunch at 2 p. m. and met again at 3 p. m. with the President in the chair.

Mr. A. S. Harihara Ayyar.—Sir, my amendment refers to section 59 clause (f) of the Bill. It runs: in sec. 59 clause (f) delete the words 'in Mattancheri or in any other town or place which the Government may, by notification in the Cochin Government Gazettee, specify in this behalf' and add in its place 'in Cochin State'. Clause (f) reads as follows:

" Where a person in Mattancheri or in any other town or place which the Government may, by notification in the Cochin Government Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds".

As the clause runs benefit is given only to persons in Mattancheri and Mattancheri alone. But this right of raising loans by deposit of title deeds is exercised throughout the length and breadth of the Cochin State. Every person in the nook and corner of the State is familiar with this and naturally transactions are going on every day. Clause (f) of the present bill recognizes the rights of persons of Mattancheri alone. That means the rights of other persons are done away with. The object of legislation in every country must be to give effect to the existing common law and rights of citizens. On the other hand this usurps the rights of citizens. This course of raising loans by deposit of title deeds by many an individual is a matter of every day practice in our State. One may have to keep one's

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credit in several ways and such loans are generally raised as short term loans for such purposes, and compulsory registration is real hardship. When the party has to go through all the formalities of registration, purchasing stamp paper and other things, certainly it would be a very great hardship. Stamps for short-term loans, mean expenses. Cost of registration will be very much. That means that it will be 10 or 12 per cent of the capital itself. It should be left to the convenience of the parties. It may be said in this behalf that it may give room for fraud. Certainly in many instances fraud may be committed by insolvents. Insolvents generally create many mischiefs and there is no means to check them. Insolvency brings into existence fictitious practices. Perhaps this may be giving room for one more item of its own category. For all such malpractices, there are courts to try and pronounce judicial pronouncements over the matters. For the mere fact that fraud would be committed, we cannot deny the existing rights of the people which they have been enjoying for so many years. So I am for deleting all the words "in Mattancheri or in any other town or place which the Government, may, by notification in the Cochin Government Gazette, specify in this behalf" and adding in its place "in Cochin State" so that the provision may be applicable for the whole State. Then another aspect of the case. We can consider the same in another aspect. As we peruse the index to the Cochin Case Law we have not come across any fraudulent transactions created by deposit of title deeds which has gone up to the Chief Court. We see no such case for the past thirty years for which we have got an index. The latest index is compiled by Mr. Mahalinga Ayyar, Vakil of the Chief Court. On a perusal of the same I do not see any case in that book on this point. Since it is against the interest of the public—no doubt a Select Committee has sat upon this Bill; but no evidence has been taken nor the views of the citizens of the State ascertained by taking evidence from individuals. It is true that the Bill was published in the Government Gazette and it may be said technically that persons should have taken objection in time. It is all true. I do not know. I may be found fault with when I say that even the Members of this House might not have gone through all the sections of the Bill. Then how can we expect the citizens both literate and illiterate of a locality to have come across the Bill. To-day's petition and agitation is only the outcome of what I informed in Chittur last month about the seriousness of this section. By this piece of legislation we are denying a right all of a sudden. So I commend to the House that my amendment may be passed.

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Mr. P. Krishna Menon.—I support this amendment. I may at the outset say that I do not support it solely on the fact that I had my friend's support in a motion which I made just now (*laughter*). I support the amendment on well recognised principles. A few moments ago we heard that the object of codification is to make the law certain. I have never yet heard the object of codification to be to annul a law which is, or rather a custom, sanctioned by law to be annulled. That has never been the object of any legislation or codification. As was observed by my Hon'ble friend this practice of equitable mortgages is prevalent throughout the State and the restrictive right that is proposed to be created by this Regulation namely restricting the right specifically to Mattancheri and also to places which may be pitched upon by Government hereafter is, I submit, no argument worth the name. If a practice has been in existence and there has been no complaint against the practice I do not see any reason why any legislation should be enacted to curtail or put a stop to the practice. Now my Hon'ble friend has referred to the index of cases reported and decided by the Chief Court. As was observed by him there is not a single case reported upon that point. From that are we to infer that considerable fraud has been committed or are we to infer that no fraud has been committed? I believe the whole House will opine that no fraud has been committed in connection with this practice.

Mr. C. A. Kunjunni Raja.—Are decisions on facts reported in the Cochin Law Reports?

Mr. P. Krishna Menon.—You know that better than I do. With regard to the particular mention of Mattancheri I do not see the reason. No doubt it will be seen that the Transfer of Property Act in British India provides this only for the Presidency Towns and one or two other towns are specifically mentioned and this privilege is restricted. Is it simply because that restriction is made in British India and the privilege is extended only to a few towns in British India that this exemption is made in Mattancheri or is it on any solid reason? I believe that though mention is made of a few towns in the British Act, that was made with a reason. In the case of those towns themselves (I mean Presidency towns), there were some reasons for their being favoured with this special facility. I believe those towns were commercial centres and by way of facilitating commercial transactions this privilege was conferred upon those towns. I perfectly agree in treating Mattancheri as a commercial centre. Are there not other towns, perhaps not to the same extent as Mattancheri, of commercial importance? Is that the only commercial centre in Cochin State? Therefore I say that if facility for commerce is the object intended,

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certainly there are any number of other towns in Cochin which should enjoy this privilege. As I submitted before, it is not because of commercial facility only that this provision was resorted to by the people at large. Even in rural places there may be conditions, though not of a commercial nature, but approaching commercial considerations. Take for instance the case of Chittur. There they have got paddy cultivation, cotton cultivation and ground-nut cultivation. In all these cases such a provision is absolutely necessary. Therefore I say that the practice is in existence, no complaint has been made against the practice and there is no reason whatever which is salutary to put a stop to it. With these words I whole-heartedly support the amendment.

Mr. K. P. Kannan Nayar.—Sir, the subject of equitable mortgages is a subject that has been very difficult to be administered even in places where this right is said to have existed before, or where it has been recognised after the Transfer of Property Act was introduced. Members will find, if they will only refer to the case of law on this question referred to in Gour's Commentaries on the Transfer of Property Act, where it is stated why this was specifically restricted, the operation of this section or the creation of mortgages by deposit of title deeds is so specifically restricted to certain Presidency Towns, on account of the nature of the commercial transactions that were going on in those towns to facilitate commerce itself. To have it applied as a rule of law throughout the whole of India itself, or for that matter throughout Cochin, would be practically taking away the restrictions sought to be imposed upon in the creation of mortgages. You will understand, Sir, that the three requisites which are considered necessary for the creation of such mortgages are: there must be a debt existing, there must be the deposit of title deeds and there must be an intention to create a mortgage. It has been the last thing that has been baffling, all; both the legislature as also the Judges are baffled in trying to find out an intention if the letter itself is tantamount to a mortgage. Then there is the question of registration law coming in, so much so, whether the intention of the parties was, by means of the letter, to create an equitable mortgage, the courts had to construe, without registration, that the letter cannot be looked into at all, and so the benefit of equitable mortgages has been given to these transactions. But there is this difficulty. No doubt there may be, as the mover suggested, there may be short term loans, for example, in the case of Chittur. That is what is stated in the petition itself, that the ground-nut cultivation to a very great extent depends upon advances made from the banks. It may

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not be possible in the case of short-term loans to have regular mortgage deeds executed and to have the stamp fee and registration fee paid in such cases. There may be some restriction placed with reference to the conferring of these rights or the recognition of these rights, so far as places where such things have to be recognised or conferred. To say that it must be conferred throughout the whole State would be making the whole proposition rather difficult. If it is found that Mattancheri is not the only place where this provision should be extended and that it should be extended to some other towns also, there may not be much objection. To say that equitable mortgages should be construed to be absolutely existing throughout the State is something which will be very difficult to work. There seems to be some fundamental principle in placing equitable mortgages existing before. As the law now stands, oral mortgages exist. To say that equitable mortgages exist in Cochin is something which I cannot understand. If oral mortgages exist, then equitable mortgages also exist and also mortgages by assurance. Now we are only to create an exception so far as that rule is concerned, that is, with a view to facilitate commercial transactions and not to have it extended throughout the whole of Cochin. I am sorry I have to oppose the amendment as it stands. But if there is any Member who wants to extend it to some other place also, I do not think the House will have any objection so far as that matter is concerned.

Mr. C. A. Kunjunni Raja.—I shall first read the corresponding British Section:

'Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, and in any other town which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds'.

From the enumeration of the towns it will be found that in British India commercial towns are given this privilege of mortgage by deposit of title deeds so that business may be transacted without the delay for the registration of documents. Why Mattancheri was preferred is, it is a rising town and is a sea-port and much commercial business is carried on there. That was the reason why the Select Committee particularly mentioned Mattancheri in the Bill and the Government was given power to extend this privilege to any other town which is fit in the opinion of the Government. So far as the extension of this privilege throughout the State is concerned, I am thankful to the mover of the amendment, for he has placed before the Council the advantages as well as the disadvantages of such

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extension. So long as a man is in insolvent circumstances, there will be no difficulty and people may not insist on these motigages; it is only when a man becomes insolvent the whole diffrculty appears. Within the course of my professional experience, I am sure the Hon'ble Members of this House who belong to the legal profession will bear with me, I have come across several cases where there was no deposit of title deeds in the first instance, and the insolvent favoured some creditors by handing over title deeds later on the eve of insolvency and the other creditors have been put to considerable loss by this deceit. I appeal to your experience whether this right is likely to be abused or not. So far as I am personally concerned I think this should not be extended throughout the State. In England the position is in favour of the mover of the amendment. In England the deposit of title deeds is allowed. Even under the Law of Property Act as amended in 1927, the law is to this effect. 'In England, equitable mortgages by deposit of title deeds are still possible.' Before you extened that right to the whole of the State this House has to consider certain factors. In England how far the commercial honesty of the people has advanced in comparison is a matter which you have to take into account; whether this right is likely to be abused here is highly problematical. I must confess I am not willing to extend it throughout the whole of the State but only to select towns. Finally with regard to the question that there are no cases reported in the Cochin Law Reports, it is within the experience of the Hon'ble Members that only cases involving questions of law are reported generally and not cases involving questions of facts. In most of the cases relating to this the question that arises is whether there was a deposit of title deeds and it is a pure question of fact and such cases are not likely to be reported. It will be within the experience of the lawyer Members that there have been several cases and many suspicious cases also must have come within their notice. I am told there is an amendment by the Hon'ble Member for Chittur to extend this privilege to the three towns of Ernakulam, Trichur and Chittur-Tattamangalam and I am told also the President has been pleased to waive notice for that amendment and it has been allowed to be moved. If that is acceptable to the House it will solve most of the difficulties that have arisen. By that amendment the names of these towns will be mentioned in the bill and nobody need wait for a notification by the Government.

Mr. Thomas Manjuran.—Sir, I wish to say a few words in this connection. The legislators must remember, at any rate all legislators proceed on the basis that it is their duty, excepting in

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very occasional matters when the practice or custom of a particular country is directly against the principles of equity or morels or things like that, legislators have always thought it their duty to follow the long standing customs. In the few cases where the legislators have thought it wise or necessary to deviate from such custom, legislators have taken the safeguard of making thorough investigations before doing so. I do not know, at any rate I am not aware of, any such investigation being made in this connection. It is well known that, by a long standing serious decision of the Chief Court, equitable mortgages are held to be legal throughout the Cochin State. I do not say one way or the other as regards the question, as to how the law exactly ought to be. What is relevant for my purpose is the fact that here is an attempt made to remove or take away the effect of a long standing custom, long recognised by the highest Court in the land, attempted to be done away without making a complete or satisfactory enquiry with a view to ascertain the public opinion on the matter. We must remember that after all legislatures are functioning in order to give expression to the sentiments of the public. Assuming for argument's sake that there is a unanimity, or almost a unanimity, of public opinion in favour of equitable mortgages, are we entitled to go behind their back, without giving them a chance of having a say that equitable mortgages should stand cancelled from the day of the passing of this Regulation? Now the point is this. We have got a petition to-day from an important Taluk of the State, Chittur, saying that the cancelling or non-recognition of these equitable mortgages is likely to affect their commercial activities seriously. To me it appears the total concelling of equitable mortgages is bound to affect adversely both the agriculturists and the traders. It is well known that the agriculturists on the eve of their harvest are often compelled to raise short-term loans. Now his title deed of his land is his sure shield for the purpose. If it is not thus possible for him to raise loans, he will have to go through the expensive process of mortgage by assurance. I am afraid the agriculturists stand seriously to lose. So also the trader. That does not take the difficulty as regards the chance of fraud. I am not just arguing one way or the other, against the sentiments of the public or against long standing custom. We must give them a chance of being heard. In fact this bill has never been published in Malayalam. We cannot expect the public, the entire public, or even a great section of the public, to have so studied this bill as to enable them to raise criticisms on it. Here is a law of far-reaching consequences being sought to be passed. I do not think it will be fair to pass such a law of far-reaching consequences practically behind their back. Although

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this Bill was published in the Gazette, since it was not translated into Malayalam and directly investigated by the Select Committee, we cannot say that the public had a chance in the matter of having their say.

Now, coming back to the reservations of the Bill itself, I cannot understand on what basis Mattancheri alone has been selected by the Select Committee to be the sole town which is to have the benefit of this institution of equitable mortgages. We should not confuse the accident of the existence of this law in the Presidency towns and a few other places with the requirements of the Cochin State. What happened was, or what seems to have happened was, in the beginning when the British traders came to British India, they brought with them their law along with their institutions of equitable mortgages. This being an ordinary law in England, they thought, they found it necessary, to have that in the Presidency town, where they first settled to develop their commerce. Since we understand that the law has been extended to other towns also—all that was done solely in the interests of commerce—and if that was done in the interests of commerce in Mattancheri, what about the town of Trichur, although it could not be compared with the business in Mattancheri? I am sure there are more retail traders and more retail business going on in Trichur than in Mattancheri. I am sure there is a law of equitable mortgages going on in Trichur. We have the evidence of a gentleman from Chittur saying that this is a very popular institution there. If Courts of Law have unhesitatingly recognised this institution and put it into operation for years together, and we have not come across any miscarriage of justice, shall we be justified in saying that this useful institution shall cease from the day this Regulation is promulgated? We have to give more thought to it and we are not to rush through legislation of this kind in this Council. A difficulty confronting us was pointed out by the Member for Vellarappilli. I am aware of that difficulty, that is, in cases where there are memoranda of letters to evidence transactions like these, courts have held that such memoranda should be registered. That difficulty need not baffle us. Had we that necessity, we may make other arrangements which will obviate that difficulty; and such a difficulty need not stand in the way of perpetuating or sanctioning a useful institution. The Hon'ble Member for Jenmies raised another difficulty that this institution is likely to be abused by those who are on the brink of insolvency, that is to say, frauds are likely to be committed. This is not the only way in which fraud can be committed. What we want to remember is this: if there is any State where this law could be successfully brought into force it is the Cochin State. We happen

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to have to-day a very remarkably satisfactory settlement and remarkably satisfactory system of document registration. The Registry offices are within easy reach, as our State is a very small one. If there are mortgages by assurance, it can be easily ascertained. In the case of persons who lend money on equitable mortgages, the lender has only to ask the borrower for the title deeds. If they do not look whether there are mortgages by assurance they have themselves to thank for. I am not aware of any great inconvenience caused to the public by the existence of these equitable mortgages. Under these circumstances I would recommend for the consideration of this House this proposition or, at any rate, at least to consider the feasibility of extending this institution to the more important trade centres. I would not restrict that institution to the Municipal Towns of Mattancheri, Ernakulam, Trichur and Chittur-Tattamangalam. What about Kunnamkulam? I know there is a good lot of trade going on in Kunnamkulam. Why should we withhold? Similarly the case of Irinjalakkuda also.

Mr. A. B. Salem.—What about Chowwara?

Mr. Thomas Manjuran.—When we are taking away from the public a long existing right we must know the consequences of doing that. But before we venture to make a substantial deviation from our law, we must ask the persons interested and try to ascertain how those deviations will work upon the parties concerned. We cannot legislate *ex-cathedra* here. This matter has not been investigated deeply by the Select Committee. Probably they thought that, since the subject matter of the Act had been subjected to so much comment in British India, that would be alright for Cochin. But Cochin conditions are quite different from British conditions; so that I would support the amendment as now proposed and would say that personally I have no objection to the amendment as it stands. I would request the House to consider at least that equitable mortgages should be extended to all the commercial centres, the centres themselves to be fixed by the Government or by this House, should any Member chose to do so. Simply to fix upon a town on a basis which extends to all towns is, I submit, an invidious distinction which is fraught with serious consequences. Certainly Trichur has as much claim as Ernakulam and as such those considerations may be taken into account before this House votes one way or the other in this matter.

Mr. A. B. Salem.—Sir, I rise to oppose this amendment. Much of the argument is not sound. The argument that the bill has not reached the public, the argument that we have not given sufficient time for the public, that we are legislating behind the back of the public, are all of a very bad taste. This

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House exists for the public and to say that this House is legislating behind the back of the public is a statement which I hardly expected from any Member. But apart from the right of this House to legislate, to take into consideration all that has been said cannot bear an examination. Let us see the points. There is equitable mortgage going on in the State. The Select Committee agreed to it. What have we done? Equitable mortgages, as it is practiced now, should not be allowed any further in the land, unless the Government is satisfied that in any particular area there should be this equitable mortgage. We have left a wide margin for the public and for any constituency that is interested to approach the Government, satisfy the Diwan and get by notification this privilege extended. Why was it extended to Mattancheri? I think it is on a par, in point of commerce, with any important commercial town in British India. I think my friend knows very little of the extent of business that is going on in Mattancheri. I can hardly conceive of that statement. Mattancheri is a very big commercial centre already. It is one of the first class Ports, and it is a rising place for trade and commerce and it is to be a great distributing centre in India. With all the developments that are coming, the Harbour and the Railway, and considering the great importance of Mattancheri as a commercial centre, we thought that Mattancheri's commerce must be recognised. Let us see the area of Mattancheri. The entire area of Mattancheri is one and three-fourths square miles. We wanted to give that town this right of equitable mortgages to draw money from the banks and not for transactions in land. The steamers cannot wait for a document to be executed. If we have this provision, people can at once draw from the bank a couple of lakhs of rupees within a few moments. It was not for the purpose of land transactions that this equitable mortgage was extended to Mattancheri. It was only for the purpose of facilitating trade and commerce. As far as land ransactions are concerned, the Select Committee thought that the time has come that there must be a document for every transaction of this sort in the interest of the public that are to be protected. Let us see who are the public who are to be protected. Ordinarily, when a man is solvent people will lend him money even without a document; but protection has to be extended only in those few cases where there is a fraudulent man about to enter the doors of insolvency. It is only to prevent such cases that protection has to be extended and it was to prevent such cases that the Select Committee thought it best to insert this provision. We have an instance brought here at the Select Committee, to satisfy the Select Committee, that such insolvents

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on the eve of their insolvency, prefer certain persons to the detriment of other creditors. Therefore the Committee thought to prevent that. One charge was brought, and the Select Committee thought of it well and came to the conclusion that the only place fit for equitable mortgages is this one and three-quarters of a quare mile. No invidious distinction was made between one part of the State and another part of the State and therefore this provision ought to stand. If any other area can satisfy the Government that this privilege would facilitate their trade, if it is extended to them, that power must be given to them. What more can a Select Committee provide ? And to say that no criticism of the public has been obtained, that again is a statement which is not warranted by facts. Are not Members of this House well informed of things that take place here ? Was not the Hon'ble Member for Trippunittura aware of the fact that the Select Committee Rreport was coming for consideration in this House? Was there a single meeting held in his constituency to show that this privilege they wanted ? Did he take the trouble of awakening his constituency—'here is a Bill, what is your opinion about this provision' And to come here and state that the legislation is going on behind the back of all the constituencies is certainly not a correct statement, not a statement that we can swallow easily. Every Member inside this House, knowing the provisions of this Regulation, if they thought that their constituency wanted such things, should have ascertained the opinion of their constituency. Has any trouble to that extent been taken by the Members? I know of not a single public meeting being held regarding this Bill or its provisions. The only evidence that I see is that the people of Chittur has been agitating. They have certainly a grievance and they think that their trade in ground-nuts may be affected and they have brought a petition. Certainly it is well worth consideration. I am sure the Government will consider and extend it to Chittur because they feel the necessity for it. That shows that there are transactions going on as short-term transactions, during the crop season and they want that facility to be extended. I see no evidence of any kind for us to alter the provisions that we have made after mature and careful consideration. Then, as regards sentiment and customs should be respected and all that, I think sometimes it is better not to enter that field at all. Sentiment and customs must be respected at times when it suits people. If not, it need not be respected. There is no sentiment or custom here. It is a question whether a man should be defeated by a man preferring to deposit his title deeds in the hand of a favourite man or in a man from whom he gets

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protection. This provision was inserted in this manner just to prevent fraud and that is one of the objects of codifying a law. Law goes to prevent fraud. When there is a fraud existing in a country or when there is a chance of fraud existing in any place the law must come and prevent it. We had no object to put obstructions in the course of trade or transactions or for the free exchange of land and money. That was not at all our object. Our object was to prevent even a chance of fraud. That is all what I have to say. I therefore oppose the proposition and as regards Chittur, the next amendment may come up. I have already stated my view of Chittur. Of course, I have no axe to grind for this town or the other town.

The Government's position may be given.

Mr. T. S. Narayana Ayyar.—To my mind it appears that the question has not been properly looked at by the Members in proposing the amendment. It is not correct to say that we have, either by custom or by practice, a law of equitable mortgages in Cochin. That to my mind appears to be a misconception. We have only mortgages and those mortgages are either oral or written, oral transfers or transfers reduced to writing. When you say oral transfers, those transfers are effected orally and by handing over documents. That should not be confounded with the other kind of mortgages which is known as a deposit of title deeds defined in the Transfer of Property Act.

Mr. P. Krishna Menon.—May we know the difference, please?

Mr. T. S. Narayana Ayyar. - In the matter of oral transfers, of course it is not evidenced by writing at all and therefore nothing more has to be done apart from indicating that there is a transfer and that indication is supplied by the fact that there is a deposit of title deeds. In the case of an equitable mortgage, there may be a document, still it need not be registered. But according to the Cochin law, once you have a transfer evidenced by a writing, that writing has to be registered under the registration law so that there was no law here which sanctions a mortgage by a deposit of title deeds. That conception was not the fundamental thing. The oral transfer was there. Now we have practically done away with oral transfers, except, of course, with regard to the transfer of immovable property to the value of less than Rs. 100. That has been accepted as law. The only question is whether we ought or ought not to make any deviation from the main provision, namely, there shall not be oral transfers of property. It is only in that spirit that the question should be raised. We have defined the several sorts of mortgages in section 58 of the British Transfer of Property Act and we say the mortgages are so and so. "Mortgages by

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deposit of title deeds" is one of the mortgages mentioned in that section. In section 60 it is said that transfers are only by assurance and in that section an exception is made, that mortgage by deposit of title deeds need not be registered. So that we are not in any way transgressing the law as it is by merely introducing this provision. That has already been done away with, when we say that we want documents registered for all assurances involving immovable property of the value of Rs. 100. That being accepted as the principle, the other question will be to what extent the exception ought to go. The Select Committee, no doubt, mentions Mattancheri as one of the places, because it was aware that Mattancheri was doing so much business and it will be hard to deprive Mattancheri of this right. If there are other commercial towns of importance, the Government is prepared to accept those towns which are said to have commercial importance and where such transactions as are absolutely necessary. I am prepared to accept that on behalf of the Government. To extend it to all towns, irrespective of the commercial importance or not, will be rather doing away with the provisions that you have already made in the Transfer of Property Act requiring registered documents for transfers. Everybody will come and say I have got a mortgage by a deposit of title deeds. We will be nullifying the provisions already made and therefore I oppose the amendment in the form in which it has been brought; and some of the Members as the Hon'ble Member for Trippunittura, do not support the motion as it is. He merely says that it ought not to be in that form. He was not supporting it in the way in which it was put. That is fundamentally wiping out the provision already made. He himself does not go further. My submission to this House is that the amendment as brought should not be accepted. It may be accepted in the modified form and the Government is prepared to accept that.

Mr. P. Krishna Menon.—Is the Select Committee in possession of any statistics with regard to the number of equitable mortgages effected in a specified period?

Mr. T. S. Narayana Ayyar.—No.

Mr. A. S. Harihara Ayyar.—Sir, so far as the provision is extended in the Indian Transfer of Property Act for the cities of Calcutta, Bombay and other big cities, I have to say that the law of England has been given effect to in those cities and the English merchants thought it advisable for their welfare that such a thing should exist. I say that equitable mortgages are in existence throughout the State. That is the form in which they exist generally now. There is the Registration Act

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which is in force which requires that all documents should be registered if they are above Rs. 100 or say those creating an interest over immovable property above Rs. 100. So in Cochin there is the Transfer of Property Act as is in force in India for mortgages—though that is not in force here. We are on the border land to British India. We borrow certain provisions from our adjacent neighbours and we are in a dubious position whether we can create any by deposit of title deeds. Nobody has got any settled notion upon that point. What we generally do is, whenever we take a deposit of title deeds, we first take a pro-note for the loan advanced to the party and there will be a covering letter in which we invariably state we have taken so many rupees as loan as per pro-note and as security for the same we have handed over to you the following title deeds as 'Vakkal Panayam'. In that covering letter we state as 'Vakkal Panayam'. From that we must infer, as the law is, the citizens are unaware what ought to be the correct procedure that they are to take. So they take it as a safeguard in stating in the covering letter as "Vakkal Panayam". Suppose therefore the court interprets, 'You have taken a letter'. In that letter I have stated also as 'Vakkal Panayam' so that it may be interpreted in both ways. If it is an equitable mortgage, it is equitable, as it is in the sense of the English mortgage. Such is the law in England. But if it is a thing that cannot be allowed in the States, I may say, "alright, you may consider it as Vakkal Panayam". There is a written authority of the party stating that it is a Vakkal Panayam. The letter is evidence of Vakkal Panayam. He just handed over the title deeds. As subsidiary deed, he gave as evidence the letter. That is the custom and practice that is in vogue in the country. It cannot be denied that equitable mortgages are not in force. Either the lawyers or the land-lords are not in a position to give definite data. So they leave everything to dubious conceptions. So the parties have manufactured their own way of taking documents for these equitable mortgages. So in a State the citizens want to reserve the right as the English merchants have taken care to legislate for those in the cities. Why a responsible citizen of the State who is enjoying the privileges and who wants to codify their own law in the State, refuse to codify in the manner in which they are in existence? I really do not understand the position advanced by the opposers. Then about agriculture and commerce: Even our Government favours these agricultural loans. Whenever Government loans are being advanced, I believe it is not embossed upon stamp paper. Even the stamp duties are being exonerated. So I generally feel, whenever I make advances

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and whenever I get more interest from them, I am pinched. I am never pinched when I advance a loan to a commercial purpose; because in commerce they make money in no moment. But that is not the case in agriculture. In an agricultural land like Cochin State, to give preference to deposits for commercial purposes and to deny the rights for agricultural purposes is, I may say, not the duty of any responsible Government. If, as a matter of fact, the citizens of the State have a voice, they will certainly object to that course and they will say that agriculture should be preferred first to commerce. It has been admitted that we have no statistics of the number of equitable mortgages that are in existence in the State. That evidence would have been taken, at least the bankers would have been called for; they would have given the statistics. I sincerely feel that the provision ought to be extended throughout the State. It is for the agriculturists that the provision should have been given first.

The amendment was put to the vote of the House and negatived.

Mr. A. S. Harihara Ayyar.—I press for a poll.

The House divided—Ayes 14 and Noes 15.

Ayes.

1	Mr. V. Achyuta Menon	8	Mr. P. Krishna Menon
2	,, I. E. Ambooken	9	,, T. K. Nayar
3	,, A. L. Antony	10	,, P. Kumaran Ezuthassan
4	,, P. C. Chanchan	11	,, C. V. Kuriyan
5	,, A. Eachara Menon	12	,, C. J. Mathew
6	Dr. A. G. Menon	13	Dr. A. R. Menon
7	Mr. A. S. Harihara Ayyar	14	Mr. Thomas Manjuran.

Noes.

1	Mr. E. Ikkanda Wariar	9	Mr. T. S. Narayana Ayyar
2	,, U. Kandar Menon	10	,, I. N. Menon
3	,, K. P. Kannan Nayar	11	,, P. Neelakanda Menon
4	,, T. K. Krishna Menon	12	Dr. D. Raghavendra Rao
5	,, T. M. Krishna Menon	13	Mr. I. Raman Menon
6	,, K. Krishna Pisharodi	14	Rama Varmha Tampuran
7	,, C. A. Kunjunni Raja	15	Mr. A. B. Salem.
8	,, K. Mohamed Seethi		

President.—The motion is therefore lost.

Dr. A. G. Menon.—My business is much minimised by the speeches delivered for the extension of this section to the whole of the State. Now I have come to a narrower circle. The supporters and the opposers of Mr. A. S. Harihara Ayyar's amendment clearly indicated in their speeches that they will support when my amendment comes forward. My amendment is to add after Mattancheri "the Municipal areas of Trichur, Ernakulam and Chittur-Tattamangalam." So I don't think there is any necessity for a speech from me. All the reasons for and against were given. The Government

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Advocate indicated in his speech that the Government will support my amendment. So I don't take any more time of the Council and I move it formally for the acceptance of the Council.

Mr. E. Ikkanda Warriar.—I beg to second the amendment.

Mr. I. N. Menon.—On a point of information. Is it necessary to take it now or can it not be done by notification? Those words are there—Mattancheri, Ernakulam, etc. Of course that notification may include other places than these.

Dr. A. G. Menon.—My point is that the amendment of Mr. A. S. Harihara Ayyar was lost on the ground that if that is passed, there is no necessity for that section at all. Though Government has the power of extending it to all the towns if necessary, my object is to see these towns also are included in the Act.

Mr. T.M. Krishna Menon.—We wanted to omit Mattancheri also.

Mr. I. N. Menon.—And now you are extending it to a few other parts of the State. Is it not enough if the matter is left to the discretion of the Government, to extend to whatsoever place or other they like ?

Dr. A. G. Menon.—Would that tantamount to an opposition by the Educational Member ? My amendment reads thus: "Where a person in Mattancheri, and in the municipal areas of Ernakulam, Trichur and Chittur-Tattamangalam or in any town or place etc." The rest remains as it is. The addition of the three Municipalities over and above the Mattancheri Municipality, is essential as it takes away the discretionary power of the Government, in the matter of these towns.

Mr. T. M. Krishna Menon.—You need not depend upon the discretion of the Government.

President.—In section 59 (f) after the word Mattancheri the words Ernakulam, Trichur and Chittur-Tattamangalam should be inserted.

Dr. A. G. Menon.—That creates some ambiguity. So to clear that ambiguity insert the words the municipal areas of Ernakulam, Trichur and Chittur.

Mr. I, E. Ambooken.—All the municipal areas.

Dr. A. G. Menon.—Yes. If only Trichur, Chittur etc., are mentioned, some extramunicipal areas are also included. Of course the whole of Mattancheri is a municipal area. But if it is Chittur and other places it includes places outside the municipal areas also. So the section 59 (f) as amended by me will read thus:—"Where a person in Mattancheri, and in the municipal areas of Trichur, Ernakulam and Chittur-Tattamangalam or in any, etc., etc."

Amendment put and agreed to.

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Question put: *that section 59 as amended, stand part of the Bill.*

59. (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.

'Mortgage', 'Mortgagor', 'Mortgagee', 'Mortgage money', and 'Mortgage-deed' defined.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money; and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold, and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Simple mortgage.

Mortgage by conditional sale.

(c) Where the mortgagor ostensibly sells the mortgaged property.—

on condition that, on default of payment of the mortgage-money, on a certain date, the sale shall become absolute, or

on condition that, on such payment being made, the sale shall become void, or

on condition that, on such payment being made, the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

Usufructuary mortgage.

(d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

English mortgage.

(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

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(f) Where a person in Mattancheri, the municipal areas of Trichur, Ernakulam and Chittur-Tattamangalam or in any other town or place which the Government may, by notification in the Cochin Government Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, and English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

Motion carried.

President.—Section 60 to 66.

Mortgage when to be by assurance.

60. Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

Section put and agreed to.

References to mortgagors and mortgagees to include persons deriving title from them.

61. Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.

Section put and agreed to.

Right of mortgagor to redeem.

62. At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee; (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor; and (c) at the cost of the mortgagor, either to retransfer the mortgaged property to him, or to such third person as he may direct or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties, or by decree of a court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment for the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

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Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Redemption of portion of mortgaged property.

Section put and agreed to.

63. (1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a retransfer, he may require the mortgagee, instead of retransferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

Obligation to transfer to third party instead of retransference to mortgagor.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

Section put and agreed to.

64. A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

Right to inspection and production of documents.

Section put and agreed to.

65. A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately or any two or more of such mortgages together.

Right to redeem separately or simultaneously.

Section put and agreed to.

66. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee—

Right of usufructuary mortgagor to recover possession.

(a) Where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property—when such money is paid:

(b) Where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money,—when the term (if any) prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in court as hereinafter provided.

Section put and agreed to.

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President.—Section 67.

Mr. T. S. Narayana Ayyar.—In line 10 of section 67 the word 'accession' ought to be replaced by the word 'acquisition.'

Mr. T. K. Krishna Menon.—I second it.

The amendment was put and carried.

Question put: *that the section as amended, stand part of the Bill.*

Accession to mortgaged property.

67. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled, as against the mortgagee, to such accession.

Accession acquired in virtue of transferred ownership.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture, or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum.

In the case last mentioned, the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary, and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession, shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Motion carried.

President.—Sections 68 to 73.

Improvements to mortgaged property.

68. (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

Section put and agreed to.

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69. Where the mortgaged property is a lease, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Renewal of mortgaged lease.

Section put and agreed to.

70. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee:—

Implied contracts by mortgagor.

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;

(b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagors title thereto ;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(d) and where the mortgaged property is a lease, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee, have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor, will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease perform the conditions contained therein, and observe the contracts binding on the lessee, and indemnify the mortgage against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

(e) and where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time, discharge the principal money due on such prior incumbrance.

The benefits of the contracts mentioned in this section shall be annexed to, and shall go with, the interest of the mortgagee as such, and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time, vested.

Section put and agreed to.

71. (1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

Mortgagor's power to lease.

(2) a. Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

b. Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

c. No such lease shall contain a covenant for renewal.

d. Every such lease shall take effect from a date not later than six months from the date on which it is made.

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e. In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed; and the provisions of sub-section(2)may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be,operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

Section put and agreed to.

Waste by motgagor in possession.

72. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate, but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one half, the amount for the time being due on the mortgage.

Section put and agreed to.

Right to foreclosure or sale.

73. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(a) to authorise any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorise the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorise a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property unless the mortgagees have, with the consent of the mortgagor severed their interest under the mortgage.

Section put and agreed to.

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Mr. T. K. Krishna Menon.—In section 70, sub-clause (d), last but one line, 'indemnify the mortgage' should be 'indemnify the mortgagee'

President.—We have passed that section. Section 74, Mr. Kannan Nayar.

Mr. K. P. Kannan Nayar.—The amendment that is proposed so far as this section is concerned is to insert the words "over the same property" after the word 'mortgagor' in line 1.

"A mortgagee who holds two or more mortgages executed by the same mortgagor, in respect of each of which he has a right to obtain the same kind of decree under section 73, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due".

This is as it stands. Now the right of the mortgagee to enforce his right in respect of mortgages even though he has got executed mortgages with respect to the different properties will be restricted as the section now stands. I want to make the meaning of the section clear by restricting the operation of that section only where he has taken mortgages with reference to the same property.

Mr T. M. Krishna Menon.—Supposing it is common property, how is it valued?

Mr. K. P. Kannan Nayar.—Will be different property so far as this section is concerned.

Mr. T. M. Krishna Menon.—Please make it clear and say how you put it.

Mr. K. P. Kannan Nayar.—Where there are common properties included in two mortgages they will be considered to be different properties.

Mr. T. M. Krishna Menon.—That may be made clear.

Mr. P. Krishna Menon.—I do not know whether that interpretation will be accepted by all. So it is better to define in the Regulation itself.

Mr. T. M. Krishna Menon.—Why not delete the whole section?

Mr. K. P. Kannan Nayar.—I do not think any other word will be necessary to make the meaning clearer. To take a concrete instance, suppose the property of A is mortgaged to B. So far as B is concerned it is a different mortgage.

Mr. P. Krishna Menon.—Some mortgagor or the same set of properties?

Mr. K. P. Kannan Nayar.—I will leave the amendment as it is.

President.—Anybody to second?

The amendment was lost for want of a seconder.

President.—The section as it is, shall be put to the votes.

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74. A mortgagee who holds two or more mortgages executed by the same mortgager, in respect of each of which he has a right to obtain the same kind of decree under section 73, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

Mortgagee when bound to bring one suit on several mortgages.

The section was put and carried.

Mr. A. S. Harihara Ayyar.—I oppose for the passing of section 74. I want to delete the whole thing. I did not vote.

President.—That is already over. We are now dealing with section 75.

The following amendment to section 75 was not moved, as the Member was then absent, and so it was considered withdrawn.

Mr. V. K. Kochunny Menon.—*In section 75 (2) line (2), substitute the words 'for proper reasons and on such terms as it deems fit' for 'at its discretion'.*

President.—So the section may be passed.

75. (1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely:—

Right to sue for mortgage-money.

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 72, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(d) where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor:

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (a) or clause (b) of sub-section (1); the court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and if necessary, re-transfers the mortgaged property.

The section was put and agreed to.

President.—Then sections 76 and 77.

76. (1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases and in no others, namely:—

Power of sale when valid.

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(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu or Muhammadan,or a member of any other race, sect, tribe or class, from time to time specified in this behalf by he Government, in the Cochin Government Gazette ;

(b) where a power of sale without the intervention of the court is expressly conferred on the mortgage by the mortgagee-deed, and the mortgagee is the Cochin Government;

(2) No such power shall be exercised unless and until—

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage, amounting at least to five hundred rupees, is in arrear, and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee arising from the sale after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into court, under section 58, of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale; and secondly, in discharge of the mortgage-money and costs and other money (if any) due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in section 77 applies to powers conferred before this Regulation comes into force.

The section was put and agreed to.

Appointment of receiver.

77. (1) A mortgagee having the right to exercise a power of sale under section 76 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the court for the appointment of a receiver, and any person appointed by the court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section,

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall

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be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee,

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section,

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not,

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver a commission at such rate not exceeding five per cent on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent on that gross amount or at such other rate as the court thinks fit to allow, on application made by him for that purpose,

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Regulation as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:—

(i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;

(ii) in keeping down all annual sums, or other payments and the interest on all principal sums having priority to the mortgage in right whereof he is receiver;

(iii) in payment of his commission and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Regulation, and the cost of executing necessary or proper repairs directed in writing by the mortgage ;

(iv) in payment of the interest falling due under the mortgagee;

(v) in or towards discharge of the principal money if so directed in writing by the mortgagee ;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed, and, the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said subsections.

(10) Application may be made, without the institution of a suit, to the court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the court for summery disposal. A copy of such application shall be served upon,

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and the hearing thereof may be attended by such of the persons interested in the application as the court may think fit.

The costs of every application under this sub-section shall be in the discretion of the court.

(11) In this section, "the Court" means the court which would have jurisdiction in in a suit to enforce the mortgage.

The section was put and agreed to.

President.—Section 78.

Mr. T. S. Narayana Ayyar.—In section 78, line 3 add the word 'the' before 'purposes.'

Mr. T. K. Krishna Menon.—I beg to second it.

The amendment was put and carried.

Question put: *that the section as amended, stand part of the bill.*

Accession to mortgaged property.

78. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations.

(a) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, *B* is entitled to the increase.

(b) *A* mortgages a certain plot of building land to *B*, and afterwards erects a house on the plot. For the purposes of his security *B* is entitled to the house as well as the plot.

Motion carried.

President.—Sections 79 to 81.

Renewal of mortgaged lease.

79. When the mortgaged property is a lease and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

The section was put and agreed to.

Rights of mortgagee to spend money.

80. A mortgagee may spend such money as is necessary:—

(a) for the preservation of the mortgaged property from destruction, forefeiture or sale;

(b) for supporting the mortgagor's title to the property;

(c) for making his own title thereto good against the mortgagor, and,

(d) when the mortgaged property is a renewable lease-hold, for the renewal of the lease; and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine per cent per annum;

Provided that the expenditure of money by the mortgagee under clause (a) or clause (b) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

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Where the property is, by its nature, insurable, the mortgagee may also in the absence of a contract to the contrary, insure, and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorise the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorised to insure.

The section was put and agreed to.

Right to proceeds of revenue sale or compensation on acquisition.

81. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money in whole or in part, out of any surplus of the sale-proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Regulation, II of 1070, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Section put and agreed to.

President.—Section 82. Mr. Raja.

Mr. C. A. Kunjunni Raja.—In section 82 clause (f) change 'of' into 'or' between reduction' and 'discharge.'

Mr. A. B. Salem.—I second it.

The amendment was put and carried.

Question put: *that section 82, as amended, stand part of the bill.*

Liabilities of mortgagee in possession.

82. When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property—

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(b) he must use his best endeavours to collect the rents and the profits thereof;

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such

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possession, and any arrears of rent in default of payment of which the property may be summarily sold;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;

(e) he must not commit any act which is destructive or permanently injurious to the property;

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, if the mortgagor so directs, in reduction or discharge of the mortgage-money,

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such amounts and of the vouchers by which they are supported;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d) and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest, and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus (if any) shall be paid to the mortgagor;

(i) when the mortgagor tenders or deposits, in manner hereinafter provided, the amount for the time being due on mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender, or from the earliest time when he could take such amount out of court as the case may be and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss (if any) occasioned by such failure.

Loss occasioned by his default.

Motion carried.

President.—Sections 83 to 85.

83. Nothing in section 82, clauses (b), (d), (g) and (h) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Receipts in lieu of interest.

Section put and agreed to.

84. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Postponement of prior mortgagee.

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Section put and agreed to.

85. If a mortgage, made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Mortgage to secure uncertain amount when maximum is expressed

Illustration.

A mortgages Sultanpur to his bankers, *B* and *Co.*, to secure the balance of his account with them to the extent of Rs. 10,000. *A* then mortgages Sultanpur to *C* to secure Rs. 10,000 *C*, having notice of the mortgage to *B & Co.* and *C* gives notice to *B & Co.*, of the second mortgage. At the date of the second mortgage, the balance due to *B & Co.*, does not exceed Rs. 5,000. *B & Co.* subsequently advanced to *A* sums making the balance of the account against him exceed the sum of Rs. 10,000. *B & Co.* are entitled, to the extent of Rs. 10,000, to priority over *C*.

Section put and agreed to.

President.—Section 86. Mr. Kunjunni Raja.

Mr. C. A. Kunjunni Raja.—Before the beginning of section 86 insert as a sub-heading 'Marshalling and contribution'.

Mr. A. B. Salem.—I second it.

The amendment was put and carried.

Question put: *that the section as amended, stand part of the bill.*

Marshalling and contribution.

If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

Marshalling securities.

Motion carried.

President.—Sections 87 to 119.

87. Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Contribution to mortgage-debt.

Where of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the

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